



In the Matter of:

Disputes concerning the payment of prevailing wage rates and proper classification by, and proposed debarment (*) for labor standards violations of:

ABHE & SVOBODA, INC.,

ARB CASE NO. 01-063

and

**ALJ CASE NOS. 99-DBA-20
through 27**

JEWELL PAINTING, INC.*

ARB CASE NO. 01-066

and

CAMERON JEWELL,*

**ALJ CASE NOS. 99-DBA-20
through 27**

and

BLAST ALL, INC.,

ARB CASE NO. 01-068

and

**ALJ CASE NOS. 99-DBA-20
through 27**

GEORGE CAMPBELL PAINTING CORP.

ARB CASE NO. 01-069

and

E. DASKAL CORPORATION,

**ALJ CASE NOS. 99-DBA-20
through 27**

and

SHIPSVIEW CORPORATION.*

ARB CASE NO. 01-070

**ALJ CASE NOS. 99-DBA-20
through 27**

With respect to work, cleaning and painting of bridges, performed pursuant to contracts issued by the State of Connecticut's Department of Transportation.

DATE: July 30, 2004

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Respondents Abhe & Svoboda, Inc., and Blast All, Inc.:

Paul M. Lusky, Esq., Kruchko & Fries, Baltimore, Maryland

For the Respondents Jewell Painting, Inc. and Cameron Jewell:

Constantine G. Antipas, Esq., P.E., Antipas Law Firm, Groton, Connecticut

For the Respondents George Campbell Painting Corp. and E. Daskal Corp.:

Jane I. Milas, Esq., Garcia & Milas, P.C., New Haven, Connecticut

For the Respondent Shipsview Corporation:

Chris Deligiannidis, pro se, Plymouth, Massachusetts

For the Administrator, Wage and Hour Division, U.S. Department of Labor:

Ford N. Newman, Esq., Douglas J. Davidson, Esq., Steven J. Mandel, Esq.,

Howard M. Radzely, Esq., Solicitor, U.S. Department of Labor, Washington, D.C.

FINAL DECISION AND ORDER

These consolidated cases arise from the finding of the Wage and Hour Administrator, United States Department of Labor, after an investigation, that contractors performing bridge painting for the State of Connecticut in the early and mid-nineteen nineties had misclassified and underpaid certain workers under Department of Labor wage determinations issued under the Davis-Bacon Act (DBA) 4 U.S.C.A. § 3141 *et seq.* (West Supp. 2003), and Davis Bacon Related Acts (DBRA), 23 U.S.C.A. § 113 (West 2001). The Administrator also determined that, in violation of Department of Labor regulations and the Contract Work Hours and Safety Standards Act (CWHSSA), 40 U.S.C.A. § 3702 *et seq.* (West Supp. 2003), certain contractors had falsified records of hours worked and failed to pay workers overtime. The Administrator calculated that the contractors owed over \$2 million in back pay to employees and proposed to debar several of the contractors from eligibility for federal and federally-assisted construction contracts. The contractors requested a hearing pursuant to 29 C.F.R. § 5.11 (2004), which was held on forty-nine days from January to August 2000. The Administrative Law Judge issued a recommended decision (with a revised Appendix) (R. D. & O.) upholding the Administrator's findings. The contractors petitioned the Administrative Review Board (ARB or Board) for review of that decision. We affirm for reasons that we discuss.

BACKGROUND

The contractors and their contracts were as follows. George Campbell Painting Corporation (Campbell) entered into two contracts with the Connecticut Department of Transportation (ConnDoT) in 1992 to clean and paint the north and southbound spans of the Gold Star bridge in Middlesex County, Connecticut (Gold Star). (Complainant's Exhibit (CX) 16a and b). Campbell signed a collective bargaining agreement with the Painters and Allied Trades of America, known as the Statewide Bridge Agreement. (CX 145). Campbell contracted with E. Daskal Corporation to do clean-up work on the ground beneath the bridge spans. (Testimony of James Peckham (Peckham) from hearing transcript at 2084-85).

Abhe & Svoboda, Inc. (Abhe or A. & S.) entered into three contracts in 1994 and 1995 with ConnDoT to clean and paint bridges. (CX 2, 4, 10, 11A, 12). These projects were known as the Arrigoni, Mill River and Old Lyme/East Lyme projects. Abhe subcontracted cleaning and painting work to Jewell Painting, Inc. (Jewell) on the Arrigoni project in 1994. (Cameron Jewell at 9956, 9967-70; CX 206A, 206B). Abhe and Jewell were non-union companies. (Gail Svoboda at 7909; Jewell at 10073).

Blast All, Inc. (Blast All) contracted with Abhe to clean and paint and/or build containments on the Mill River and Old Lyme/East Lyme projects. It also contracted with A. Laugeni & Son, Inc. (Laugeni) for Southington/Glastonburg, Connecticut, L.G. DeFelise, Inc. (DeFelise), and SIPCO.¹ (CX 78, 79, 203, 204, 287). Blast All agreed to the Statewide Bridge Agreement in 1993, but, when it expired in 1995, declined to sign the successor agreement. (Stephen Bogan at 8424, 8430-37).

EDT was a non-union company that erected containments and collected spent debris on the Arrigoni project.² (Svoboda at 7837, 7860, 8212; Nancy DiPietro at 4505; *see* Respondents' Exhibit (RX) 34: CX 205). Shipsview Corporation was a non-union company that did the painting work, including containments, on the Meriden and Crooked Street bridges.³ (CX 9).

Each of the bridge painting projects received federal funds under the Federal Aid Highway Acts, 23 U.S.C.A. § 101 *et seq.* (West 2001), a Davis-Bacon Related Act, *see* 23 U.S.C.A. § 113; 29 C.F.R. § 5.1(a)(12) (2004). The contractors therefore were subject to the prevailing wage requirements of the DBA and its implementing regulations at 29 C.F.R. Part 5, and the overtime requirements of the CWHSSA.

The bridge painting contracts required employees to perform similar core tasks: to mobilize, assemble, move and disassemble containments; to set up to blast, operate

¹ DeFelise and SIPCO are not parties to this appeal.

² Laugeni, EDT is not a party to this appeal.

³ Shipsview Corporation did not file a brief.

blasting pots and recycling machines, and blast; to set up to paint and to paint; to clean spent debris from blasting; to clean-up generally; and to control traffic. (e.g., for Campbell, *see* Gregory Campbell at 9331-33, 9364, 9394-9400; Peter Morris at 9662-65; for Abhe, *see* Brian Chrysler at 706-07, 711-12, 802; Darrell Cecil at 1642-48, 1656-59; Svoboda at 7831-33, 8212, CX 206A, 206B; for Blast All, *see* Harvey Strausser at 641; Kenneth Rowland at 860-66; Bogan at 8528-30, 8538-39, 8555-56, 8784, 8788-89). Because employees were exposed to lead during the blasting process, they took daily showers for decontamination. (Matthew Mennard at 144; CX 106; Svoboda at 7863-64; Jewell at 10007; Bogan at 8764).

According to the painting contracts, the bridges first had to be blasted to remove rust and old lead paint prior to repainting. In addition, for health and safety reasons, the blasting had to occur in containments that provided access for blasting and painting and held the spent debris. The 1992 Gold Star project was the first non-experimental project to require 100 per cent containment. (Campbell at 9103). Although the blasting process was similar, the containment assembly and construction varied from contractor to contractor. For example, on the Gold Star project, Campbell used Beeche platforms,⁴ impermeable tarpaulins, wooden bulkheads, and wooden “doghouses.” (Mennard at 124-125; Mark Verity at 196; Morris at 9663). Abhe used some of those containments, as well as tarpaulins and wooden bulkheads. (Chrysler at 707-11, 738-39; Svoboda at 7943, 7962, 7969). Blast All’s containments consisted of wooden platforms and flexible tarpaulins. (Rowland at 832, 835; Bogan at 8724, 8837; Blast All Exhibit (BX) 26). Jewell used “Ark” aluminum containments that were assembled on site, wood and metal bulkheads with impermeable tarpaulins, “spider baskets” and “buggy” containments. (Jewell at 9952-54; Adam Collette at 1747-48, 1751-52).

Although the wage determinations (WDs) that were incorporated in the contract bidding process may have had different classifications for “painter,” “carpenter,” or “laborer,” the bridge painting contractors were not free to make their own ad hoc determination into which classification the work at issue fell; rather, local area practice, reflected in collective bargaining agreements and then the WDs, controlled what was deemed to be painters’ work.

The Wage and Hour Division had reason to believe in 1996 that contractors that had performed bridge painting contracts for the State of Connecticut might have misclassified, and therefore underpaid, workers under the DBRA. These contractors did not pay workers performing all tasks associated with bridge painting, including construction of scaffolds and containment structures, and clean-up of lead waste, the rate for painters on bridge construction (e.g., \$31.85/hour in some years), established by various wage decisions (e.g., CX 35 at 15). Rather, these contractors had paid

⁴ Referred to in the transcript as “beach” platforms.

carpenters' rates (e.g., of \$18.50/hour) for construction of scaffolds and containment structures, and laborers' rates (e.g., of \$16/hour) for cleanup of lead waste.⁵

After receiving that information, James Peckham of the Wage and Hour Division conducted a compliance investigation. He first reviewed the applicable wage determination to establish whether the wage rate for painters was based on a collectively bargained rate. (Peckham at 2136). He testified that the wage decision contained a notation, "PAIN0011C," that indicated this was a union wage rate derived from the collective bargaining agreement entered into by Painters' District Council 11. (Peckham at 2142).

He then conducted a "limited area practice survey" (LAPS) in accordance with the Wage and Hour Field Operations Handbook (FOH), Chapter 15, Section 15f05(c), to verify that the work was, by local area practice, considered painters' work to be paid at the collectively bargained painters' rates incorporated in the WD. (Peckham at 2107-08; CX 45). The pertinent subsection of the FOH is entitled, "How to conduct a limited area practice survey to determine the proper classification of work." It provides in part: "(1) First, determine whether the applicable WD [wage determination] contains union negotiated rates or open shop (nonunion) rates for the classification at issue." Then,

(2) If the applicable WD reflects union rates for the classifications involved, the unions whose jurisdiction the work may be within should be contacted to determine whether the respective union performed the work in question on similar projects in the county in the period one year prior to the beginning of construction of the project at issue. If so, each union should be asked how the individuals who performed that work were classified. . . . In addition, the information provided by the unions should be confirmed with collective bargaining representatives of management (e.g., contractors' associations such as local chapters . . .). If all parties agree as to the proper classification for the work in question, the area practice is established.

FOH, Chapter 15, Section 15f05(c)(2).

In accordance with the FOH, Peckham contacted representatives of the respective unions, the painters, laborers, and carpenters, to inquire which workers performed the work in question on similar projects in the area in the one-year period prior to the beginning of construction on the projects at issue. Peckham contacted a business agent for Painters' District Council 11, Dominick Cieri, and asked him if the painters claimed

⁵ The rates varied depending on the year, collective bargaining agreement, and wage determination involved.

jurisdiction of “rigging” on bridge painting projects; Cieri said they did. (Peckham at 2027).

To assist in Peckham’s investigation, Painters’ District Council 11 sent inquiries concerning which trades performed the work to a number of painting contractors that had performed bridge painting contracts in the year prior to the project he was investigating, and received responses from four of them. (Peckham at 2143-44, 2157-58). A letter from Michael J. Gresh Painting, for example, stated, “On the above noted projects we’ve employed painters who belong to District Council 11 and have paid them the appropriate wages as stated in the specifications for the projects under the category of ‘Bridge Painting.’ At no time did we hire any other ‘laborers’ to do any of the work required by our contract.” (CX 181).

Peckham contacted a laborers’ union business agent, Leonard Granell, who told him that laborers do not do any work on bridge painting projects. (Peckham at 2193-94). Peckham also contacted a carpenter business agent, Bob Lanier, who told him “carpenters weren’t involved with bridge painting projects.”⁶ (Peckham at 2197).

Peckham explained that he did not ask any non-union contractors because “[a]s the FOH section is clear, if I have union rates in the wage decision, what matters for area practice reasons is the way the union contractors have divvied up the work, what their agreements or understandings are as to who is going to be doing what on a particular project.” (Peckham at 2159).

In the course of the Wage and Hour investigation Peckham also got in touch with a management representative, Louis Shuman, Assistant to the President of the Connecticut Construction Industries Association (CCIA) and Director of Labor Relations for CCIA, an organization that negotiated collective bargaining agreements with all of the construction trades other than the painters. (Louis Shuman at 7352). Shuman testified that “most of the larger members of the CCIA are in the heavy and highway division,” that is, those that would perform bridge construction, repair or reconstruction contracts. (Shuman at 7342). Shuman testified that Peckham asked him “what I knew about the makeup of painter’s crew, and whether the laborer’s [sic] participated in painting work.” (Shuman at 7352). Shuman agreed to investigate the question and called members of the CCIA who were bridge construction contractors to ask what their practices were. (Shuman at 7352-53). Each of the general contractors he spoke to said they subcontracted painting work. (Shuman at 7354-55). Shuman contacted Tom Laugeni, a painting contractor, who told Shuman they did not currently have laborers on their painting crews. (Shuman at 7356).

⁶ Lanier did add one caveat, that “if somebody else has already built a structure or scaffolding to get up to a certain point, the painters aren’t going to tear it down and rebuild their own structure. Aside from that, they handle all of their own access structures.” (Peckham at 2197).

Shuman also requested information from the heads of the Laborers' Union locals in Hartford, Connecticut, and New Haven, Connecticut, who at first claimed laborers did work on painting crews, but had no response when Shuman asked them to name some painting projects using laborers. (Shuman at 7357-60). The New Haven Laborers' local leader told Shuman he could not think of any painting projects in the last three and a half years on which laborers worked. (Shuman at 7360). Both leaders promised to get back to Shuman with the names of such projects, but they never did. Shuman concluded that, if these very knowledgeable labor leaders could not name any painting projects on which laborers worked "[t]hat laborers are not part of the painting crews." (Shuman at 7360).

Specifically, Peckham's union and management contacts confirmed that painters performed all the work associated with bridge painting projects, including construction of scaffolds and containment structures and cleanup of lead waste. (Peckham at 2201-12, 2027-29, 2193-97, 2362; Kenneth Murray at 6030-31, 6038-40; Dominick Cieri at 6347-55; Leonard Granell at 7095-98; 7104-09, 7129, 7149-51, 7155-57; Robert Loubier at 7223-37, 7282-84, 7288-89; Shuman at 7352-61; CX 142-145 (Statewide Bridge Agreement); CX 189-170; CX 190).

Peckham's Wage and Hour investigation, therefore, followed the specific requirements of the FOH for a LAPS. He determined that the WD contained union rates for the painter classification. He consulted with painters', carpenters' and laborers' unions and collective bargaining representatives of management and learned that the parties agreed that the proper classification for the work in question was painter work. Thus, the area practice was established.

In fact, Wage and Hour exceeded the FOH requirements. Peckham obtained the names of painting contractors and the identity of bridge painting contracts performed in Connecticut from 1991 to 1995, and examined the payroll records for those projects. (Peckham at 2157-59; CX 177, 181, 185-186). He found that, with few exceptions, the contractors had utilized only union painters and apprentices on these projects and had paid them union rates. (Peckham at 2177-81, 2193; CX 209, at 37-41; CX 177, 181, 185-186).

In the course of its investigation, Wage and Hour also discovered other violations of the DBRA: that Daskal had failed to pay Davis-Bacon prevailing rates for workers performing clean-up work on the ground under two bridges, although these workers were covered by the DBRA because they were "laborers or mechanics," 29 C.F.R. § 5.2(m) (2004), who performed work which was "construction" work under the DBRA, 29 C.F.R. § 5.2(j), "on the site of the work." 29 C.F.R. § 5.2(j)(1)(i); R. D. & O. at 27-31; and that Jewell had falsified its payrolls, and had repeatedly paid its employees for eight hours of unreported overtime at the straight time rate, a violation of the CWHSSA. R. D. & O. at 41-42, 27-31, 71, 78-84. Wage and Hour calculated over \$2 million of back pay due for the misclassification and overtime violations. *See* R. D. & O. at 50-60.

ISSUES

We consider the following issues in the disposition of this case:

Whether the record supports the ALJ's findings of fact and conclusions of law notwithstanding his adoption of the Administrator's post-hearing brief.

Whether the DBRA required the contractors to pay collectively-bargained painters' rates for the bridge painting work at issue.

Whether the contractors violated the DBRA by misclassifying and underpaying employees performing work on bridge painting projects.

Whether the scope of work clauses in the collective bargaining agreements were ambiguous and did not inform contractors that painters claimed the work.

Whether the LAPS was inadequate and relieved the contractors of the responsibility of complying with the DBRA.

Whether "mixed crews" of painters, carpenters and laborers worked on bridge painting projects and local area practice assigned grit collection to laborers.

Whether the contractors were entitled to make wage classification decisions based on a "tools of the trade analysis."

Whether a change in containment standards represented new technology not governed by the previous wage classifications.

Whether the DOL should be estopped from charging misclassification of workers and seeking back pay because the ConnDoT acquiesced in and/or directed the contractors to pay carpenters' and laborers' rates on bridge painting work.

Whether Daskal workers performing clean up duties on the ground below the bridges were "laborers or mechanics" employed "directly on the site of the work" under the DBA.

Whether Shipsview and Christos Deligiannidis, and Jewell Painting and Cameron Jewell engaged in aggravated or willful violations of the DBRA that should debar them from obtaining contracts subject to the DBRA for a period not to exceed three years.

JURISDICTION AND STANDARD OF REVIEW

The Board has jurisdiction, inter alia, to hear and decide appeals taken from ALJs' decisions and orders concerning questions of law and fact arising under the DBA and the numerous related Acts which incorporate DBA prevailing wage requirements. *See* 29 C.F.R. §§ 5.1, 6.34, 7.1(b) (2004).

In reviewing an ALJ's decision, the Board acts with "all the powers [the Secretary of Labor] would have in making the initial decision" 5 U.S.C.A. § 557(b) (West 2001). *See also* 29 C.F.R. § 7.1(d)(2004) ("In considering the matters within the scope of its jurisdiction the Board shall act as the authorized representative of the Secretary of Labor. The Board shall act as fully and finally as might the Secretary of Labor concerning such matters."). Thus, "the Board reviews the ALJ's findings of fact and conclusions of law de novo." *Thomas & Sons Bldg. Contractors, Inc.*, ARB No. 00-050, ALJ No. 96-DBA-37, slip op. at 4 (ARB Aug. 27, 2001), *order denying recon.*, slip op. at 1-2 (ARB Dec. 6, 2001); *see also Cody-Zeigler, Inc. v. Administrator, Wage and Hour Div.*, ARB Nos. 01-014, 01-015, ALJ No. 97-DBA-17, slip op. at 5 (ARB Dec. 19, 2003); *Sundex, Ltd. and Joseph J. Bonavire*, ARB No. 98-130, slip op. at 4 (Dec. 30, 1999) and cases cited therein.

In addition, the Board will assess any relevant rulings of the Administrator to determine whether they are consistent with the statute and regulations, and are a reasonable exercise of the discretion delegated to her to implement and enforce the Davis-Bacon Act. *Miami Elevator Co.*, ARB Nos. 98-086/97-145, slip op. at 16 (Apr. 25, 2000), *citing Department of the Army*, ARB Nos. 98-120/121/122 (Dec. 22, 1999) (under the parallel prevailing wage statute applicable to federal service procurements, the Service Contract Act, 41 U.S.C.A. §§ 351-358 (West 2001)); *see also Cody-Zeigler, Inc.*, slip op. at 5. The Board generally defers to the Administrator as being "in the best position to interpret those rules in the first instance . . . , and absent an interpretation that is unreasonable in some sense or that exhibits an unexplained departure from past determinations, the Board is reluctant to set the Administrator's interpretation aside." *Titan IV Mobile Serv. Tower*, WAB No. 89-14, slip op. at 7 (May 10, 1991), *citing Udall v. Tallman*, 380 U.S. 1, 16-17 (1965); *see also Cody-Zeigler, Inc.*, slip op. at 5.

DISCUSSION

I. Record supports ALJ's findings of fact and conclusions of law notwithstanding his adoption of Administrator's post-hearing brief

A. & S. argues that, because the ALJ adopted substantial portions of the Administrator's post-hearing brief in as his 92-page R. D. & O., the ALJ "made no attempt at an independent review of the issues involved in this proceeding." Opening Brief of A. & S. and Blast All, Inc. at 4. Although A. & S. notes that the ALJ presided over 49 days of testimony and took notes, it argues that the word-for-word copying of the Administrator's version of the facts and legal arguments reflected a pro-government bias and a lack of independence that deprived the company of due process under the Administrative Procedure Act. *Id.* at 8-16. *See also* Opening Brief of George Campbell Painting Corp. and E. Daskal Corp. at 46-47.

The regulations governing ALJ proceedings under the DBA, DBRA and CWHSSA parallel the requirements of the Administrative Procedure Act, 5 U.S.C.A. §§ 556-557 (West 1996), and provide:

The decision of the Administrative Law Judge shall include findings of fact and conclusions of law, with reasons and bases therefor, upon each material issue of fact, law, or discretion presented in the record. Such decision shall be in accordance with the regulations and rulings contained in part 5 and other pertinent parts of this title. The decision of the Administrative Law Judge shall be based upon consideration of the whole record, . . . It shall be supported by reliable and probative evidence.

29 C.F.R. § 6.33(b)(1).

On several occasions, the United States Supreme Court has addressed the issue of the effect of the trial judge taking findings verbatim from the prevailing party's brief or requests, and has ruled that they stand if the evidence supports them. In *Anderson v. Bessemer City*, 470 U.S. 564 (1985), the district judge informed the plaintiff he was ruling in her favor, then asked her counsel to write up and submit findings of fact, which the district judge used in his final decision. The Supreme Court held that the district judge did not use only the submitted findings of fact to reach its decision. The Court also noted, "Nonetheless, our previous discussions of the subject suggest that even when the trial judge adopts proposed findings verbatim, the findings are those of the court and may be reversed only if clearly erroneous." *Id.* at 572.

In *United States v. El Paso Natural Gas Co.*, 376 U.S. 651 (1964), the district judge ruled from the bench for the plaintiffs, and then declared he would not write an opinion. Instead, he asked the party's counsel to "[p]repare the findings and conclusions and judgment." *Id.* at 656. The district court then adopted the submitted findings of fact and conclusions of law verbatim. The Supreme Court held that, while this practice is discouraged, and produces a decision that is much less helpful to the appellate court, "Those findings, though not the product of the workings of the district judge's mind, are formally his; they are not to be rejected out-of-hand, and they will stand if supported by evidence." *Id.*

In *United States v. Crescent Amusement Co.*, 323 U.S. 173 (1944), the government sued a line of amusement parks for anti-trust violations under the Sherman Act. The district court ruled for the government, and borrowed its findings from the government briefs. Defendants objected on appeal. The Supreme Court held,

[t]he defendants finally object to the findings on the ground that they were mainly taken verbatim from the government's brief. The findings leave much to be desired in light of the function of the trial court. But they are

nonetheless the findings of the District Court. And they must stand or fall depending on whether they are supported by evidence. We think they are.

Id. at 184-85 (internal citations omitted).

The Second Circuit, where this case arose, applied the Supreme Court test in *Counihan v. Allstate Ins. Co.*, 194 F.3d 357 (2d Cir. 1999). In *Counihan* the government was attempting to seize certain property. The district court ruled for the government, and adopted certain portions of the government's briefs verbatim, while revising other portions. The property owner objected, and raised the issue on appeal before the Circuit. The Circuit stated,

As a final point of error, Counihan contends that the district court's findings of fact were clearly erroneous because (1) the findings of fact constituted "near-verbatim" or "wholesale" adoptions of the Government's proposed findings. . . . Findings of fact that have been taken verbatim from those proposed by counsel have been criticized; nonetheless, they are not to be rejected out-of-hand, and they will stand if supported by evidence. When a district judge does more than merely adopt a party's proposed findings, the findings issued by the District Court represent the judge's own considered conclusions, which may not be set aside unless clearly erroneous.

Id. at 363 (internal citations and quotations omitted).

Thus, while the wholesale adoption of the prevailing party's brief is to be discouraged, an ALJ's findings of fact will not be set aside if the evidence supports them. The record in this case consists of a 10,609 page hearing transcript and more than 600 exhibits. Based upon our review, we have concluded that that record supports the ALJ's findings of fact and that his conclusions of law are legally correct. Because of the contractors' concerns about the form of the R. D. & O., we have paid particular attention to the contractors' arguments before us, and tried to respond to them with detailed citations to the record.

II. DBRA required contractors to pay collectively bargained painters' rates for bridge painting work at issue

The Wage and Hour Division correctly concluded that the painting industry in Connecticut treated bridge painting projects as a single trade job, and therefore utilized only painters. The industry paid painters' wage rates contained in the Connecticut

Statewide Bridge Agreement for all tasks associated with bridge painting, including construction of scaffolds and containment structures, and cleanup of lead waste.

A. Classification of duties under WD must be determined by area practice of unions and signatory contractors

Under the applicable law, the contractors had to pay prevailing wages in accordance with the way local unions classified the work. Where, as in this case, prevailing wage rates are based upon a collective bargaining agreement, proper classification of duties under the WD must be determined by the area practice of the unions that are party to the agreement. In the leading case, *Fry Bros. Corp.*, WAB No. 76-06 (June 14, 1977), the respondent paid employees as laborers rather than as carpenters. The Wages Appeals Board established that the WDs reflected union rates and found that the disputed work belonged exclusively to carpenters under local practice. It therefore upheld the Secretary of Labor's determination that the respondent's employees were misclassified and underpaid. The Wage Appeals Board wrote,

If a construction contractor who is not bound by the classifications of work at which the majority of employees in the area are working is free to classify or reclassify, grade or subgrade traditional craft work as he wishes, such a contractor can, with respect to wage rates, take almost any job away from the group of contractors and the employees who work for them who have established the locality wage standard. There will be little left to the Davis-Bacon Act. Under the circumstances that the Assistant Secretary determined that the wage determinations that had been issued reflected the prevailing wage in the organized sector it does not make any difference at all what the practice may have been for those contractors who do and pay what they wish. Such a contractor could change his own practice according to what he believed each employee was worth for the work he was doing.

Id. at 17.

Thus, in DBRA classification cases the rate to be paid for particular tasks is the rate found to be prevailing in the locality for that work, regardless of what tools the workers use. The Wage Appeals Board stated in *Volkman R.R. Builders*, WAB No. 94-10 (Aug. 22, 1994):

[T]he appropriate classification for Davis-Bacon work is the classification utilized by firms whose wage rates were determined to be prevailing and were incorporated in the applicable wage determination. In this case, . . . the rates

listed in the wage determination reflected collectively bargained wage rates. Therefore, . . . Wage and Hour examined union practice to determine which crafts performed the work in question.

Slip op. at 2 (paraphrasing the Administrator's argument with approval); *see also Sentinel Elec. Co.*, WAB Case No. 82-09, slip op. at 7 (Apr. 5, 1984) (“[T]he results of this area practice survey reveals [sic] that the work of installing low voltage fire alarm systems in the Tucson, Arizona, area, is performed by electricians being paid the rate contained in the applicable wage determination.”).

B. Area practice of unions and signatory contractors was to pay collectively bargained painters' rates for work at issue

According to the prevailing practice of unionized bridge painters in Connecticut, the work at issue was painters' work and should have been paid at the prevailing wage rate for painters. *Accord Fry Bros.* Many of the parties Peckham contacted in his Wage and Hour investigation also testified at the hearing. We review the evidence.

The WD for the Connecticut bridge painting at issue is based on a collective bargaining agreement, the Statewide Bridge Agreement. (Peckham at 2027-29, 2137, 2142, 2758-59, 2840, 2883-84; Murray at 6030-31, 6038-39; Cieri at 6347; CX 142-145).

Union officials from painters', laborers', and carpenters' unions all testified that work on bridge painting projects in Connecticut fell within the painters' union. Kenneth Murray, Business Representative and Business Manager of District 11, International Union of Painters and Allied Trades, and Dominick Cieri, also a Business Representative with District 11, testified that all work on bridge painting in Connecticut, not just operating blasting and painting guns, fell within the work of the painters' union. (Murray at 6030-31; Cieri at 6347-55).

Leonard Granell, Field Representative for Laborers' Local Union 230, and Robert Loubier, Council Representative to the New England Council of Carpenters, agreed that all work on bridge painting was within the jurisdiction of painters. The laborers and carpenters unions did not claim that work. (Leonard Granell at 7095-98; 7104-09, 7129, 7149-51, 7155-57; Loubier at 7223-37, 7282-84, 7288-89). Frank White, Business Manager for Laborers' Local 547 in Groton, Connecticut, testified that the work on the Gold Star project was within the jurisdiction of painters and that his members did not work on unionized bridge painting jobs.⁷ (Frank White at 9813, 9822, 9829).

⁷ Campbell Painting and E. Daskal take issue with the ALJ's characterization of the testimony of White in an effort to show that it was perfectly legitimate for a contractor to assign grit collection to laborers. Opening Brief of Campbell and Daskal, at 25-26. In fact, White's testimony supports the Administrator's position that painters claim and do all the work on painting jobs. White testified:

Management officials, union bridge painting contractors, and painters testified that bridge painting work was paid at collectively bargained painter rates. Louis Shuman, the Assistant to the President and Director of Labor Relations for Connecticut Construction Industries (CCIA), a contractors' bargaining representative, testified the work at issue was within the jurisdiction of the painters' union. (Shuman at 7340-61). Executives from Laugeni, Connecticut's largest unionized painting contractor, and another smaller Connecticut painting contractor, testified that the work at issue was considered painters' work. (Thomas M. Laugeni at 7452-7641; Greg Laugeni at 10303-82; Thomas G. Laugeni Depo., CX 209; Gene Wambolt at 8800-9017).

Thus, the only collective bargaining agreement that any employee worked under was the Statewide Bridge Agreement. There was no jurisdictional dispute among unions; no union other than the painters' union claimed bridge painting work. Actual pay practices supported the agreement among unions. Workers were paid painters' rates for tasks performed on bridge painting projects.

Union officials, painting company executives, and painters testified that on union jobs the prevailing practice was to pay painters' rates for "rigging" (which included assembling, moving and disassembling all cables, platforms and containments), grit collection and traffic control. For example, Counsel for the Administrator took the deposition of the elder Thomas G. Laugeni (which was introduced at the hearing because Laugeni was ill and would have been out of town at the time of the hearing). Laugeni was asked at his deposition "on these bridge projects that you did in the '90s, after the full containment requirement . . . was implemented, what trade was involved in putting up the scaffolding on your jobs?" Laugeni answered "we've used strictly painters." Counsel for the Administrator continued:

Q. What about the rigging?

A. Strictly painters.

Q. What trade put up the containment barriers?

A. Strictly painters.

(Thomas G. Laugeni Depo., CX 209 at 37).

The State of Connecticut required all waste produced in blasting old paint off a bridge to be collected, which Laugeni did by use of vacuums and a dust collector that

I seen the construction trailer [on the Gold Star bridge project], and I went up and talked to him, see if there was any work or if I could get laborers on it. At that period it was slow. You went all over trying to put your people to work. And I talked to them. And they said it was a painting job. It was jurisdiction of the painters.

(White at 9813).

also provided negative air pressure within the containment structure. (*Id.*) Laugeni was asked, “who operates the dust collector? A. Once you start it, it’s usually the painters who will have it . . . running.” His examination continued

Q. You also mentioned that you acquired vacuums?

A. Right.

Q. What are vacuums used for?

A. To suck up the grit off of the decks It’s big hoses, six-inch hoses.

Q. And who would operate these vacuums?

A. The painters.

Q. Was this in conformance with the full containment?

A. Yes.

(*Id.* at 38). (*See also* Murray at 6032, 6039-40, 6098-99, 6234, 6265; Cieri at 6361-62, 6504; Granell at 7097, 7104; Loubier at 7241; Thomas M. Laugeni (the younger Thomas Laugeni) at 7461-62, 7467, 7496, 7479-80, 7501-04, 7511, 7525, 7531-32, 7557; Wambolt at 8901, 8915, 8920-21, 8933, 8937; Campbell at 9360-66; Thomas G. Laugeni (the elder) Depo., CX 209, at 67; Cecil at 1631; Verity at 221-223; Rowland at 831; Tetreault at 1954-65; Granell at 7105, 7108, 7113; Thomas G. Laugeni at 10328; CX 146).

Experienced painters testified that they were paid for work associated with bridge painting at collectively bargained painter rates. Robert Mennard testified that union contractors paid him painter rates for blasting, painting, rigging, cleaning up sand, grit and steel shot, scraping old paint, assembling, moving and tearing down containments, and shower time. (Mennard at 97-142). Mark Verity was paid painter rates for rigging pick boards, cables, blasting lines, moving rigging and blasting equipment, sweeping sand, setting up Beeche platforms, traffic control, sweeping and shoveling grit, and showering, even though much of this work involved the use of hand tools not normally associated with painting. (Verity at 185-98, 203-05, 208, 224-30, 242, 324-25).

No neutral fact witness, i.e., one not affiliated with one of the Respondent contractors, testified that bridge painting was not the sole jurisdiction of the painters’ union. There may have been some instances in which certain contractors, either unwittingly or intentionally, paid carpenters’ and laborers’ wages for the above-mentioned work, ignoring or evading the Statewide Bridge Agreements and the DBRA wage determinations. But the weight of the evidence was that the local area practice in Connecticut was for painters to do all the work, and receive painters’ and painters’ apprentice wage rates under the Statewide Bridge Agreements on bridge painting projects.

III. Contractors violated the DBRA by misclassifying and underpaying employees performing work on bridge painting projects

As a result of the foregoing, we find that the contractors here misclassified their workers performing work on DBRA bridge painting projects and paid them at rates lower

than the prevailing rates for the painter classification as set forth in the applicable WD. As a consequence, back pay is due for the difference between the wages actually paid and the applicable prevailing wage.

The ALJ found that it was contrary to Connecticut local area practice (and therefore the DBRA) to pay laborers' and carpenters' rates for the work at issue. R. D. & O. at 18. He found that the Respondent contractors reduced the "prevailing wages in the applicable WDs by reclassifying painters' work into subgrades and then paying employees lower wages for performing tasks which should have been paid at the painter rate" which was "contrary to the principles of *Fry Brothers*." *Id.* at 19. Painters were not "tended" (i.e., assisted) in Connecticut by lower paid, unionized employees, as were other crafts like masons and carpenters. *Id.* at 20.

None of these contractors had authorization from DOL or ConnDoT to pay less than the painters' rates for any of the work related to the bridge repainting. Instead, they made their own classifications to determine whether their workers should be paid the painters', carpenters' or laborers' rates based on a tools of the trade analysis; e.g., a worker using a blasting hose or spray gun was deemed to be a painter, while one working with wood and a screw gun might be a carpenter. (Svoboda at 8079-80, 8082-8083, 8101-02, 8136-37; CX 211 at 140-42; Jewell at 9963-65, 10073; Bogan at 8243, 8810-11; CX 210, at 180-81). Daskal was alone in claiming that its employees doing clean-up work under the Gold Star bridges were exempt from the DBA. It paid its workers below even the laborer rate for the WD. (CX 219 at 2-4).

Before September 1994, Campbell paid painters' and painters' apprenticeship rates for employees performing the disputed work. (Mennard at 139-41; Verity at 205, 217-18, 223, 230, 237, 241, 324-25; CX 106). Thereafter, Campbell continued to pay painters' rates for blasting or painting, but entered into a "side bar" agreement with the local painters' union, District Council 11, for new classifications of employees, known variously as "abrasive blast material removers," "material handlers," or "paint sweepers." These employees did grit collection, clean-up, and material handling, and were paid at laborers' rates, plus fringe benefits at painters' rates. (Murray at 6142-44; Cieri at 6384-86; CX 106, 174). The applicable WD had no such classification.

The ALJ held, citing *Van Den Heuvel Elec., Inc.*, WAB No. 91-03 (Feb. 13, 1991) (agreements between union and contractor to pay lower rates than those specified in an applicable WD invalid as matter of law), that the "side bar" agreement was unenforceable because it authorized payment of wage rates lower than those specified in the wage determination. R. D. & O. at 25-26. We concur in the ALJ's ruling that Campbell's pay practices on the Gold Star project after September 1994 violated the DBRA, *id.* at 22, 26, and adopt his conclusion that DOL properly computed back wages against Campbell for the reasons stated therein, *id.* at 54-56, Revised Appendix A.

Abhe paid painters' rates for blasting or painting and to certain core employees. (Svoboda at 7862, 7906; CX 211 at 90, 176-77, 248-49). However, it paid carpenters' rates for building containments (Svoboda at 7861-62, 7942-43), and laborers' rates for

the balance of the work, including decontamination showers. (Crysler at 713, 748; Cecil at 1636; Svoboda at 7827, 7860-64, 7906, 7947, 7970-71, 7975; (Abhe Exhibit (AX) 16; CX 284). Abhe split rates according to tasks. (AX 16; CX 284).

The ALJ concluded that Abhe violated the DBRA when it failed to pay its employees the prevailing wage for painters performing painters' tasks on the Arrigoni, Mill River, Old Lyme/East Lyme projects. R. D. & O. at 35. He decided that Abhe's tools of the trade analysis resulted in practices that were contrary to local area practice, and that there was a consensus that carpenters and laborers did not tend painters. *Id.* at 36. We concur in the ALJ's ruling that Abhe's pay practices on the Arrigoni, Mill River, Old Lyme/East Lyme projects violated the DBRA, *id.* at 31, 40, and adopt his conclusion that DOL properly computed back wages against Abhe for the reasons stated therein, *id.* at 51-54, Revised Appendix A.

Jewell also paid painters' rates for actual blasting and painting, but laborers' rates for the rest, including building containments. (Peckham at 4926; Collette at 1757, 1760-61; Justin Tetreault at 1870-71). We concur in the ALJ's ruling that Jewell's pay practices violated the DBRA, R. D. & O. at 41-42, and adopt his conclusion that DOL properly computed back wages against Jewell for the reasons stated therein, *id.* at 51-54, Revised Appendix A.

Blast-All likewise paid painters' rates for all employees engaged in blasting and painting, laborers' rates for most other employees, and carpenters' rate for some, but not all, employees who worked with wood and put up tarpaulins. (Strausser at 636-48; Rowland at 831-36, 860-67, 1524-28; Bogan at 8525, 8528-33, CX 51, 53-57; CX 210, at 175-76; CX 233, 285, 287). The ALJ determined that Blast All's use of a tools of the trade analysis resulted in pay practices that were inconsistent with the local area practice in Connecticut, and therefore violated the DBRA. R. D. & O. at 47-48. We concur in the ALJ's ruling and adopt his conclusion that DOL properly computed back wages against Blast All for the reasons stated therein. *Id.* at 56-57, Revised Appendix A.

EDT was a non-union company that erected containments and collected spent debris on the Arrigoni project. (Svoboda at 7836-37, 7860, 8212; DiPietro at 4505; RX 34: CX 205). Its workers were paid carpenters' rates for installing containments and laborers' rates for the rest, including showers. (DiPietro at 4506; CX 48; RX 42). We concur in the ALJ's ruling that EDT's pay practices on the Arrigoni project violated the DBRA, R. D. & O. at 40-41, and adopt his conclusion that DOL properly computed back wages against EDT for the reasons stated therein, *id.* at 51-54, Revised Appendix A.

Shipsview paid many of its employees less than painters' rates for work performed on the bridge painting contracts, based on its own tools of the trade analysis. (CX 212 at 38-46). However, some Shipsview employees were not paid painters' rates even when they were painting. (Richard Rawlings at 1381-1390). The company employed split and laborers' rates. (CX 212, at 37-38, 53, 161-62). We concur in the ALJ's ruling that Shipsview's pay practices on the subject bridge painting contracts violated the DBRA, R. D. & O. at 48-50, and adopt his conclusion that DOL properly

computed back wages against Shipsview for the reasons stated therein, *id.* at 58-60, Revised Appendix A.

IV. Analysis of bridge painting contractors' arguments

The Respondent contractors have made a number of arguments in support of their positions. We have considered those arguments, but reject them for the reasons we now discuss.

A. Contractors' argument that scope of work clauses in collective bargaining agreements were ambiguous and did not inform contractors that painters claimed the work

A. & S. and Blast All argue that the scope of work clauses in the respective collective bargaining agreements were ambiguous and contractors had no way of knowing that the painters claimed all the work on bridge painting projects. Opening Brief of A. & S. and Blast All, Inc., at 36-37, 52-53. Given Svoboda's years of experience on 500 DBRA covered contracts, we find this contention less than persuasive. Moreover, "Contractors who seek to perform work on a federal construction project subject to the Davis-Bacon Act have an obligation to 'familiarize themselves with the applicable wage standards contained in the wage determination incorporated into the contract solicitation documents.'" *American Bldg. Automation, Inc.*, ARB No. 00-067, slip op. at 6 (ARB March 30, 2001) (quoting *Joe E. Woods*, ARB No. 96-127 (Nov. 19, 1996)).

Furthermore, a examination of the relevant collective bargaining agreements refutes the contractors' position as to containment and collection activities. The Statewide Bridge Agreement stated:

The jurisdiction of work hereinafter set forth and work rules hereto attached shall apply to the maintenance, preparation, cleaning, all blasting (water, sand, etc.), painting or application of any protective coatings of every description on all bridges and appurtenances of highways, roadways, and railroad. *All metalizing, containment and collection of sand and other material in the performance of blasting and coating operation*, all noise barrier rail, sign mounts, and all other items that require paint or coating on any road, highway, or railroad in the State of Connecticut [sic].

(CX 159, Section 1 (emphasis added)). There can be little doubt that containment and collection of waste from the blasting process is covered by this agreement in the italicized words. Although "rigging," that is, building scaffolds and containment structures, is not

explicitly mentioned in the Statewide Bridge Agreement, the testimony established that it was the practice for painters to perform that function.⁸

Robert Loubier, the representative of the New England Regional Council of Carpenters, was asked, “Now you previously had testified that carpenters do not build containment structures for painters. Can you tell us why not?” He responded:

On a painting job, the painters go on and there’s no work for the carpenter. So the painters build their own – hook up their own scaffold, bring their material on the job. There is no other trade that, like a laborer, that services the painter. So the painter is responsible because it’s a single trade job. The painter unloads his material, he builds his – runs his own scissor lift, or spider lift, or builds his containment because our understanding with the 1920 agreement, if it was a single trade job, like just a painting job, like the Gold Star Bridge was four or \$5,000,000, there was no carpenter work involved so the painter built his own scaffold, or whatever he used. So when we – when I, as a business agent, look at a job and I see it’s just painting, then my understanding of the 1920 agreement was the painter has a right to build his own scaffold, because he’s the only trade on it. That’s what we’ve been using for years.

(Loubier at 7288-89).

The 1920 “agreement” Loubier referred to was a decision by the National Joint Board for the Settlement of Jurisdictional Disputes, Building and Construction Trades Department of the AFL-CIO, rendered on April 28, 1920. A. & S. attempts to imply that the following language from that decision established the jurisdiction of the carpenters over certain scaffold construction, including that connected to bridge painting:

Erection of Scaffolds as Applied to Building Construction

(Subject of dispute between the International Hod Carriers’,
Building and Common Laborers’ Union, United

⁸ A. & S. makes much of the fact that the Connecticut Statewide Bridge Agreement for 1995-1996 with the painters union did not explicitly claim rigging in the jurisdiction of work clause, and when Peckham pointed this out to the union, they said it was an oversight and obtained an addendum to the agreement specifically covering rigging. A. & S. claims this shows rigging was not claimed by the painters and they were trying to cover their tracks by obtaining the addendum after the fact. Opening Brief of A. & S. and Blast All, Inc., at 46-49. Whatever interpretation is placed on this sequence of events, it cannot be denied that the carpenters did not claim rigging on painting jobs, i.e., building scaffolds and containment structures. *See* discussion *infra*.

Brotherhood of Carpenters and Joiners, Operative Plasterers and Cement Finishers' International Association and Bricklayers, Masons and Plasterers' International Union.)

DECISION RENDERED APRIL 28, 1920

In the matter of the dispute between the Laborers, Bricklayers, Plasterers and Carpenters over the erection of scaffolds as applied to building construction, it is agreed that the erection and removal of all scaffolds, including trestles and horses used primarily by Lathers, Plasterers, Bricklayers and Masons, shall be done by the mechanics and laborers in these trades as directed by the employer. Self-supporting scaffolds over fourteen feet in height or any special designed scaffolds or those built for special purposes shall be built by the Carpenters. The making of horses and trestles other than temporary is the work of the Carpenter.

See Opening Brief of A. & S. and Blast All, Inc., at 31.

It is evident that the 1920 agreement did not relate to painters. Loubier's testimony refutes the position of A & S and Blast All on this point. Indeed, it is difficult to believe that highly experienced contractors such as A. & S. or Blast All could reasonably have believed, given this decades old understanding, that carpenters built scaffolds and containment structures for painters. Loubier explained why carpenters, and other trades, do not "tend" painters, that is, perform work necessary in the preparation, execution, or clean up of painting jobs:

Q. And what were the carpenters doing while the painting was occurring?

A. Carpenter work.

Q. And could you please explain specifically what you mean.

A. We'll take I-91, lane construction. We do a section of sound barrier. And as we progress down the road, because there's miles of sound barrier, after we got a section completed and the weather was right, the painting contractor came in and sprayed the sound barrier that was put up. If we finished the bridge and all of the forms were taken down, the painting contractor was then able to go in and paint the steel on the bottom underneath of the bridge. So the carpenter would be at another junction or another spot on the job working while the painter was doing his work, because we don't work when the painter's painting.

We're in the way. So most of the trades are out of the way when the painter does his job. So we might be on the same job, but just not at that section of the job while he's painting.

(Loubier at 7229). Loubier told Peckham “we’ve never built a scaffold for the painting contractors. They built their own with the painters.” (Loubier at 7223). Loubier also gave the following responses to questions by the Administrator’s counsel:

Q. Do you know of any instances or projects where carpenters erected containment structures for the painters?⁹

A. No.

Q. Do the carpenters claim that work?

A. No.

(Loubier at 7232; *see also* Loubier at 7237 (same)).

A. & S. introduced numerous exhibits intended to show that painters, carpenters and laborers worked on the same projects, implying that carpenters and laborers worked on painting-related aspects of those projects. Loubier’s testimony also refutes that assertion. He testified about numerous general contractors that had reached a collective bargaining agreement with the carpenters through the CCIA and for which union carpenters had done work, including Arborio Corporation; Baier Construction; Blakeslee, Arpaia, Chapman, Inc.; and Brunalli Construction. (Loubier at 7237-41). With respect to building scaffolds or platforms for painters, Loubier said

On the projects that I’ve watched as a business agent, I don’t know of any scaffolds that we’ve built for the painters. And my recollection is that painters did their own if they needed a scaffold, or they worked off a scissor lift truck or scissor lift platform where they operated it themselves.

(Loubier at 7241).

⁹ Loubier gave detailed testimony about what containment structures are, demonstrating his personal familiarity with that work. (Loubier at 7230-31). Whether Loubier knew about scaffold erection practices on each and every painting contract during the relevant period does not significantly detract from the probative force of his testimony, particularly his statement that the carpenters did not claim rigging work on painting jobs or the painting portions of bridge construction or repair projects.

B. Contractors' argument that limited area practice survey was inadequate

The Respondent contractors charge that the limited area practice survey was inadequate, but this is in reality a collateral attack on the prevailing wage rates. The WD had already been issued and used in the bidding process. R. D. & O. at 31. If contractors wish to protest the use of union wage rates as prevailing, it must be at the wage determination stage, before the award of the contract, and not at the enforcement stage. *Clark Mech. Contractors, Inc.*, WAB No. 95-03 (Sept. 29, 1995); *Fry Bros.*, slip op. at 17.

As the ALJ pointed out, the LAPS was not used to establish wage rates, but rather as an investigatory tool in the compliance investigation to verify information the investigator received from union and other representatives. R. D. & O. at 39. The number, nature and timing of the projects surveyed in the LAPS is not a significant issue. *Id.* at 31. Even if inadequate, the LAPS did not relieve the Respondent contractors of their responsibility to comply with the DBRA. *Id.* at 39. The legally controlling issue is whether painters' rates had to be paid for all work performed on the bridge painting projects. *Id.* at 30, 37-38.

A. & S. asserts it was error for Wage and Hour (as well as the ALJ) to refuse to consider assignments of work by union contractors to non-union employees as evidence of local area practice. A. & S. argues that "[i]t was Complainant's burden to show that there was a *uniform* agreement between the crafts that only painters should do the collection and containment work on these projects. The DOL did not carry its burden to show that *only* painters built containments and shoveled grit in Connecticut." A. & S. Opening Brief at 53-54.

A. & S. misunderstands the "prevailing wage" concept in the DBRA. Prevailing wage is not synonymous with "universal" or "uniform." The regulations clearly state "[t]he prevailing wage shall be the wage paid to the majority (more than 50 percent) of the laborers or mechanics in the classification on similar projects in the area during the period in question." 29 C.F.R. § 1.2(a)(1)(2003). Furthermore, as discussed above, under the FOH, when questions arise as to the proper classification for the work performed by a laborer or mechanic, Wage and Hour first conducts a "limited area practice survey." FOH, § 15f05(b). There is no question here that the WD contains union negotiated rates. *See* discussion above of notation "PAIN0011C." In such circumstance, the FOH directs that the unions within whose jurisdiction the work may be should be contacted to determine whether the respective union performed the work in question on similar projects in the county. If so, each union should be asked how the individuals who performed the work were classified. In addition, the information provided by the unions should be confirmed by the collective bargaining representative of management. *Id.* at § 15f05(c)(2).

That is exactly what Peckham did; he contacted representatives of the painters',¹⁰ carpenters', and laborers' unions, as well as a representative of the local contractors association, the CCIA. All of them told him that painters do all the work associated with bridge painting projects in Connecticut. See discussion above. The fact that *some* union contractors deviated from the collective bargaining agreement, the Statewide Bridge Agreement, and assigned work to non-union workers, or to carpenters or laborers, or paid carpenters' or laborers' rates for scaffold and containment construction or waste cleanup, does not vitiate the prevailing wage determination or establish that it was not local practice to use painters to perform the tasks in question on bridge painting jobs. The evidence produced by A. & S. thus is insufficient to rebut the Administrator's showing that the prevailing local practice was to employ painters.

For example, Blast All had signed the Statewide Bridge Agreement and Steve Bogan, chief of operations for Blast All, attended the negotiation session on the renewal of the agreement with the painters' union in 1995. Bogan did not object at that meeting to editing of the scope of work clause to clarify that constructing scaffolds and containment structures were covered by the agreement and were painters' work. But thereafter, he refused to sign the agreement and began assigning carpenters to such work on bridge painting jobs, as well as assigning laborers to grit collection, and paying them the respective carpenters' and laborers' rates. (Bogan Depo., CX 210 at 254; Bogan at 8424, 8430-37; Murray at 6129-30; Cieri at 6373). As the Wage Appeals Board said in *Fry Bros.*,

If a construction contractor who is not bound by the classifications of work at which the majority of employees in the area are working is free to classify or reclassify, grade or subgrade traditional craft work as he wishes, such a contractor can, with respect to wage rates, take almost any job away from the group of contractors and the employees who work for them who have established the locality wage standard.

Fry Bros., slip op. at 17.

C. Contractors' arguments that "mixed crews" of painters, carpenters and laborers worked on same bridge construction projects and that local area practice assigned grit collection to laborers

A. & S. introduced a number of certified payrolls that show that painters, carpenters and laborers worked on the same bridge construction projects. (*See, e.g.*, RX 21 (Brunalli Construction Co. certified payrolls for certain workweeks in 1993 and

¹⁰ A. & S. disparages the statements of the painters union representatives as self-serving; A. & S. has no explanation for the statements of the other unions' representatives, as well as the director of labor relations for the CCIA, that were in complete agreement with the painters.

1994))¹¹ A. & S. draws the inference that these trades all worked on the painting aspects of such projects. Opening Brief of A. & S. and Blast All, Inc., at 19-21. A. & S. also asks the Board to infer that, because the Laborers' Union conducted training in lead abatement for its members, laborers worked on grit collection on bridge painting projects. Opening Brief of A. & S. and Blast All, Inc., at 25, 32, 40-41; Opening Brief of Campbell and Daskal, at 20. Such inferences are not justified on this record.

Louis Shuman, the CCIA Director of Labor Relations, testified:

Q. Okay. Mr. Shuman, there were some questions about the Brunalli Company on cross examination. What does Brunalli do? What kind of work do they do?

A. He constructs bridges mostly and rehabs them, if there's an existing bridge. And he's an expert in bridge building.

Q. And what is your understanding as to what work the laborers do on bridge building or bridge rehab projects?

A. Well, if you're talking about the entire bridge project, the laborers participate in a great many phases of the work. It's heavy construction. So they participate in the digging of the foundation for the piers, or maybe even start before that. They participate in clearing the site, if it's a new bridge. They participate in the demolition of the old bridge. They unload materials brought to the site. They pour concrete into forms for the piers of the bridge and for the outlying parts of the bridge. . . .

Q. What is your understanding as to what type of work laborers do on a bridge painting project, what union laborers would do on bridge painting projects?

A. As far as I know, they don't participate in bridge painting projects.

Q. Do you have any understanding as to why laborers, union laborers need lead abatement training?

A. Oh, they do lead abatement work. The most – the biggest exposure of a laborer to lead is the demolition of an existing structure, because of the use of the lead paint to preserve steel members, you run into lead taking down the old structure. And they have to be very aware of the presence of lead, and take steps to reduce their personal

¹¹ It is difficult to understand the relevance of some of the exhibits A. & S. refers to in support of its argument that mixed crews of painters, carpenters and laborers worked on bridge painting projects. For example, A. & S. cites RX 20, a partial copy of the Contract and Special Provisions for Rehabilitation of Bridge No.0138-94, Route 156 over AMTRAK. Nothing in that document states which trades shall perform which tasks on the project; the same is true as to RX 22.

exposure to the lead.

(Shuman at 7418-19).

The respondent contractors cite several documents in the record as well as portions of the testimony in support of their argument that local area practice routinely included assignment of grit collection to laborers or other similarly titled workers. For example, on September 9, 1994, the Painters' Union and Campbell Painting entered into the "sidebar" agreement "establishing" a new worker classification of "Abrasive Blast Material Remover" for the Gold Star Bridge Project. (CX 174). A. & S., as well as Campbell and Daskal, point to that agreement as evidence that contractors routinely assigned grit collection work to laborers or similarly titled workers at less than the painter's wage in the wage determinations, without objection by the Painters' Union. Opening Brief of A. & S. and Blast All, Inc., at 25-28, 46-49; Opening Brief of Campbell and Daskal, at 22-23. Campbell maintained that, because the Painter's Union was unable to supply enough apprentices (to whom grit collection usually was assigned) for the Gold Star project, the company requested that the Painter's Union for the establish of a new classification to meet Campbell's need for workers performing those tasks. (Murray at 6142-44; Cieri at 6384-86; CX 173). Contrary to Respondent contractors' assertion, if anything, this "side-bar" agreement tends to show that this work was routinely claimed by and assigned to painters. Such a "side-bar" agreement would not have been necessary if grit collection work had been routinely assigned to laborers without objection by the Painters' Union.

D. Contractors' argument that they were entitled to make wage classification decisions based on "tools of the trade" analysis

Abhe contends that its "tools of the trade" analysis should govern wages for bridge painting, rather than union classification and pay practices prevailing in the locality where the work was performed. Opening Brief of A. & S. and Blast All, Inc., at 17-19, 50. We disagree.

Counsel for A. & S. asked how A. & S. determined what wages it would use to calculate the amount of its bid: "Q. Okay. How do you determine during this bidding process what craft group you will use on a particular job?" (Paul Lusky at 7800). Svoboda said,

We establish and determine the wages that are going to be paid to employees, the minimum wages that are going to be paid to employees, by the tools of the trade method. Whatever tools those employees will use in their work that is required for that work, that's the minimum wage that's to be paid to those employees.

(Svoboda at 7800).

On their projects, A. & S. and Blast All paid various crafts, including painters, laborers and carpenters, using a “tools of the trade” analysis. The contractors paid a laborers’ rate to employees who performed grit collection, grit clean-up, assembly, moving and dismantling of containment work structures and traffic control because clean-up work using brooms, shovels and vacuums was historically laborers’ work and fell within the written craft jurisdictional language of the local laborers’ union. Opening Brief of A. & S. and Blast All, at 17. Similarly, A. & S. and Blast All paid carpenters’ rates to employees performing construction of wood airlocks, bulkheads, walls and platforms on bridge projects. *Id.*

We reject A. & S. and Blast All’s arguments for a “tools of the trade” analysis in making wage determinations. Since there is no generally accepted agreement as to which “tools” belong to which “trade,” allowing contractors to make their own decisions would lead to inconsistent results. For example, Abhe paid employees holding blasting guns the painter rate (Svoboda at 7862), while Shipsview paid them the laborer rate. (Deligiannidis Depo., CX 212, at 52-53).

A. & S. and Blast All assert that a contractor should be able to use a classification included in bid documents as long as it falls within a craft jurisdiction set forth in the local collective bargaining agreement. They claim that they had no way of knowing that laborers could not be used to perform the work called for in the contract. Opening Brief of A. & S. and Blast All, at 17. However, the inclusion of a job classification on a wage determination (e.g., laborer) does not necessarily mean it is applicable to a particular contract (i.e., for bridge painting). As we have said, it was incumbent upon the respondent contractors to go beyond the list of job classifications on the wage determination to ascertain the actual local area practice. *American Bldg. Automation, Inc.*, slip op. at 4-5.

Although Svoboda professed to be fully conversant with DBRA, wage determinations and the concept of prevailing wages (Svoboda at 7799-7800), having worked on about 500 prevailing wage jobs (Svoboda at 7794), he failed to accept the actual governing principle in DBRA classification cases: the rate to be paid for particular tasks is the rate found to be prevailing in the locality for that work, regardless of which tools the workers were using. *Fry Bros.; Volkmann R.R. Builders; Sentinel Elec. Co.*

E. Contractors’ argument that change in containment standards represented new technology not governed by previous wage classifications

We next discuss the “change in technology” on bridge painting jobs in Connecticut in the early 1990s to protect workers and the public from the hazards of lead waste generated by blasting old paint off bridges. A. & S. and Blast All and Campbell argued that the change was dramatic, not evolutionary, and that, as a consequence, the painter classification for grit collection had become obsolete.¹² Opening Brief of A. & S.

¹² The only dispute was whether the change was “dramatic” or only “evolutionary.”

and Blast All, Inc., at 65-71; Opening Brief of Campbell and Daskal Corp. at 8-11. The evidence does not support their position.

At the hearing, the younger Thomas Laugeni, Thomas M. Laugeni, who had overseen almost 2,000 bridge painting jobs, explained the change in technology:

Q. In the course of your tenure of working with A. Laugeni and Son, has the nature of bridge painting changed, in particular ways, since you started working?

A. Definitely.

Q. Can you explain how?

A. In the early '90s, approximately maybe 1992, there was an incident with a painting contractor that forced different regulations for the lead interpretation. And it forced everyone to go from 75 percent containment to 100 percent containment, requiring different equipment, different collection procedures and definitely a lot more blood leads being done on a monthly basis, hazcon programs. And that's pretty much the change from basically very little containment to 100 percent containment. That's what I've seen.

Q. And what if you could explain to us what 100 percent containment means?

A. 100 percent containment is that you're going to seal something in when you're abrasive blast cleaning, keeping all the dust and abrasives, spent abrasive, inside the containment area, where before you didn't have to do that. We're also forced to draw air across the men's' [sic] work area to alleviate the exposure to lead. So the change has been 100 percent containment, using a negative pressure machine, and also collecting every bit of the abrasive blast material.

Q. And how was that collection done of abrasive blast material?

A. Collection is done through vacuum collection.

(Thomas M. Laugeni at 7459-60).

A. & S. cites the testimony of Laugeni in support of its argument that there was an advent of new technology in the 90s. Opening Brief of A. & S. and Blast All, Inc. at 65. A. & S. argues that this was a "dramatic" change in technology on bridge painting projects that justified a new work classification and made Peckham's limited area practice survey outdated. Opening Brief of A. & S. and Blast All, Inc., at 67-69.

But A. & S. does not cite the rest of Laugeni's testimony in which he described the very "Beeche" platforms on which A. & S. placed considerable emphasis as being

drastically different technology. Laugeni first used Beeche platforms on a bridge painting project in Bridgeport, Connecticut on which Brennan Construction was the general contractor. (Thomas M. Laugeni at 7460-61). Laugeni described the Beeche platform and then was asked

Q. [W]ho performed the work of erecting the containment on that Bridgeport project?

A. A. Laugeni and Son.

Q. And which particular trades did the work?

A. Painters.

(Thomas M. Laugeni at 7466).

When Laugeni explained that there was blasting and collection of grit on that project; counsel for the Administrator asked “Q. [w]ho performed that job [collection of grit] in terms of which trade? A. The painters.” Laugeni further testified that, on a large bridge painting contract covering six or seven bridges, which had been awarded to A. & S., painting work on three of the bridges was subcontracted to Laugeni and Son. The work involved abrasive blasting, collection and full containment and applying three coats of paint. All the work was done by painters, including vacuum collection of grit. (Thomas M. Laugeni at 7466-67).

The fact that there had been a change in technology does not, in and of itself, justify a “tools of the trade” analysis for classifying workers. The “touchstone” is local area practice. As Peckham’s limited area practice survey revealed and Laugeni’s testimony fully supports, it remained local practice that painters performed all the work¹³ associated with bridge painting projects in Connecticut, even after the changeover to 100 per cent containment.¹⁴

¹³ The only exception was where other trades had erected platforms for use in other aspects of bridge construction, when painters would use those platforms rather than inefficiently tear them down and build their own. (Peckham at 2197; Murray at 6242; Cieri at 6503; Loubier at 7219-20; Granell at 7104-05; Thomas M. Laugeni at 7499-7500, 7526, 7542; Wambolt at 8895-96).

¹⁴ Contrary to A. & S.’s assertion, Peckham’s survey was not limited to local practices before the advent of 100 per cent containment. He investigated bridge painting projects from June of 1993 to June of 1995. (Peckham at 2145).

F. Contractors' argument that DOL should be estopped from charging misclassification of workers and seeking back pay because ConnDoT acquiesced in and/or directed contractors to pay carpenters' and laborers' rates on bridge painting work

One of A. & S.'s major arguments for reversal is that the Department of Labor should be estopped from charging misclassification of workers and seeking back pay because the ConnDoT repeatedly acquiesced in, and in some cases directed, A. & S. to pay carpenter and laborer rates on bridge painting work.¹⁵ A. & S. argues,

ConnDOT [sic] followed a deliberate course of conduct which motivated Blast All and Abhe & Svoboda to use laborers and carpenters on the Connecticut bridge projects. . . . Not only did ConnDOT authorize mixed crews on its bridge projects, . . . it took specific action in progress meetings on the Arrigoni Bridge project to ensure that Abhe & Svoboda would pay a laborer rate for certain work being done on the projects. Abhe & Svoboda also submitted a training program for laborers and carpenters to ConnDOT's Division of Contract Compliance. This training proposal specifically described the kinds of things laborers and carpenters would be doing on the project. This proposal was approved by the Contract Compliance Division. In light of such evidence of specific and repeated conduct by ConnDOT officials misleading Petitioners in this case, it is irresponsible for [the ALJ] to suggest that "there is not the slightest whiff of affirmative misconduct."

Opening Brief of A. & S. and Blast All, Inc., at 82 (citations omitted). A. & S. also points out that ConnDoT required them to pay laborer rates for shower time. *Id.* at 39, 83. *See also* Opening Brief of Campbell Daskal, at 42-46.

Whether or not ConnDoT engaged in "affirmative misconduct" misses the point. The Department of Labor cannot be estopped by the actions of a contracting agency. To begin with, estoppel is rarely, if ever, granted against the federal government, although the Supreme Court in *Heckler v. Community Health Serv.*, 467 U.S. 51, 59 (1984), did not rule it out entirely. The standards for granting estoppel against the Department of Labor have not by any means been met here.

¹⁵ Jewell Painting reiterated A. & S.'s estoppel argument, *infra*, and made an additional assertion. Jewell claimed that, because there was no regulation requiring payment of local area prevailing wage rates, Jewell could rely on ConnDoT's actions for estoppel purposes. Reply Brief in Support of Petition for Review of Jewell Painting, Inc. and Cameron Jewell, at 5. However, the regulations explicitly provide "[t]he *prevailing wage* shall be the wage paid to the majority . . . of the laborers or mechanics in the classification on similar projects in the area during the period in question." 29 C.F.R. § 1.2(a)(1) (2004) (emphasis in original).

Estoppel can only be invoked against the government when the government agency has engaged in some affirmative misconduct, which is something more than simple negligence. *Dantran Inc. v. United States Dep't of Labor*, 171 F.3d 58, 67 (1st Cir. 1999). Furthermore, estoppel will only lie “if it would ‘not frustrate the purpose of the statutes expressing the will of Congress.’ . . . This type of holding extends to legal requirements fixed by duly promulgated regulations.” *Id.* (quoting *FDIC v. Hulsey*, 22 F.3d 1472, 1489 (10th Cir. 1994)). Moreover, as the Wage Appeals Board said in *L.T.G. Constr. Co.*, WAB Case No. 93-15 (Dec. 30, 1994):

It is well settled law that the mistakes of one agency cannot be used to estop another agency from carrying out its statutory responsibilities. *U.S. v. Stewart*, 311 U.S. 60 (1940) and *Graff v. C.I.R.*, 673 F.2d. 784 (5th Cir. 1982). DOL is charged with the responsibility of assuring that workers on federally financed or assisted construction projects are not exploited and receive the prevailing wages to which they are statutorily entitled. To invoke estoppel against DOL to defeat a legitimate claim for back wages on behalf of aggrieved workers may be a legal impossibility (see *Heckler v. Community Health Services of Crawford County, Inc.*, 457 U.S. 51 (1984)), but even if were not, it would require at a minimum a compelling demonstration of conscious and aggravated misconduct *on the part of DOL*.

Slip op. at 6 (emphasis added).

L.T.G. was reversed and remanded for further fact finding in *Griffin v. Reich*, 956 F. Supp. 98, 100 (D.R.I. 1997), where the district court held that, in appropriate circumstances, estoppel would lie against the government. The court ordered reconsideration of whether *L.T.G.* met all the elements of estoppel, including reasonable reliance on representations by HUD, the “contracting” agency in that case. The district court distinguished cases the WAB cited for the proposition that the mistakes of one agency cannot be used to estop another. 956 F. Supp at 108. It held that “the regulatory and statutory scheme [DBRA] expressly contemplates that HUD, the contracting agency, has authority to monitor compliance with labor standards provisions.” *Id.* After remand and reconsideration of the facts by a different ALJ, the Administrative Review Board held that *LTG* could not invoke estoppel because the contractor did not show he had actually complied with HUD’s guidance. *Lloyd T. Griffin v. Sec’y of Labor*, ARB Nos. 00-032, -033, ALJ No. 91-DBA-94 (ARB May 30, 2003).

As other cases have made clear, however, only the Secretary of Labor or her delegee, the Administrator of the Wage and Hour Division, has the authority to interpret the Davis-Bacon Act; any other approach would lead to widely varying applications of the Act from contracting agency to contracting agency. As stated by the Wage Appeals Board:

This Board has rejected estoppel argu[ment]s that a petitioner's reliance upon the advice of the contracting agency as to the appropriate wage rate operates to relieve petitioner of its responsibility to pay the proper wage rate to laborers and mechanics employed on the project. The Secretary of Labor was given the power to regulate the interpretation and enforcement of the Davis-Bacon and related acts by Reorganization Plan No. 14 of 1950. This authority has been reinforced by two opinions of the Attorney General of the United States. *Sentinel Electric Company*, WAB Case No. 82-09 (April 5, 1984). *See also Jos. J. Brunetti Construction Co.* and *Dorson Electric and Supply Co., Inc.*, WAB Case No. 80-09 (Nov. 18, 1982), *Metropolitan Rehabilitation Corp.*, WAB Case No. 78-25, (Aug. 2, 1979) and *Tollefson Plumbing and Heating Co.*, WAB Case No. 78-17, (Sept. 24, 1979).

Prometheus Dev. Co., WAB No. 81-02 and 81-03, slip op. at 9 (Aug. 19, 1985) (alterations in original) (*quoting Warren Oliver Co.*, WAB No. 84-08 (Nov. 20, 1984)).

The courts have also rejected A. & S.'s position. In *Dantran, Inc. v. United States Dep't of Labor*, 171 F.3d 58, 66 (1st Cir. 1999), the First Circuit observed that:

Estoppel against the government is a concept more frequently discussed than applied. While the Supreme Court has never definitively ruled out the possibility of an estoppel against the government, it consistently has emphasized the difficulties that such a concept entails. *See, e.g., OPM v. Richmond*, 496 U.S. 414, 419-20, 423, 110 S.Ct. 2465, 110 L.Ed.2d 387 (1990) (plurality op.); *Heckler v. Community Health Servs.*, 467 U.S. 51, 60-61, 104 S.Ct. 2218, 81 L.Ed.2d 42 (1984). If estoppel against the government possesses any viability (a matter on which we take no view), the phenomenon occurs only in the most extreme circumstances.

171 F.3d at 66. Wage and Hour had cited *Dantran* for paying its employees on a monthly, rather than a bi-monthly basis, on Postal Service contracts that the Service Contract Act covered. Wage and Hour had actually reviewed *Dantran* a few years prior to the investigation in which a violation was found, and that investigation had found no violations, although *Dantran* was using the same pay practices then. Officials of the Postal Service also had made statements to *Dantran* indicating its practices were acceptable.

In rejecting Dantran’s claim of estoppel, the court said “[w]e cannot in good conscience accept a broad rule that prevents the sovereign from enforcing valid laws for no better reason than that a government official has performed his enforcement duties negligently.” *Id.* The First Circuit explained further that “estoppel, if available at all, would only succeed if it would ‘not frustrate the purpose of the statutes expressing the will of Congress.’ This type of holding extends to legal requirements fixed by duly promulgated regulations.” *Id.* at 67 (citations omitted). In discussing what conduct, beyond simple negligence, might support estoppel, the court said that the first compliance officer’s clean bill of health for Dantran was not issued with the intent to mislead them about their responsibilities. It concluded, “[in] a nutshell, there is not the slightest whiff of affirmative misconduct.” *Id.*

Therefore following *Dantran*, if negligent conduct of a DOL employee, a representative of Wage and Hour itself, cannot be the basis for estoppel of DOL, then clearly actions or inactions of ConnDoT cannot estop DOL. A. & S.’s recitation of the facts, at length, of ConnDoT’s actions or failures to act, therefore, are unavailing. ConnDoT’s actions cannot estop DOL, and the Respondent contractors have not alleged let alone proven that any DOL official engaged in affirmative misconduct.¹⁶

V. Daskal workers performing clean up duties on the ground below the bridges were “laborers or mechanics” employed “directly on the site of the work” under the DBA

We now consider the argument of Daskal, Campbell’s subcontractor, that its employees who performed clean-up work under the Gold Star project were not subject to the DBA. Opening Brief of Campbell and Daskal, at 31-42.

Daskal contends that its employees engaged in the tasks of maintenance, not covered by DBA, such as clean up of lunch areas after coffee breaks and meal times; site preparation and restoration services; hauling general trash (not hazardous waste); running errands to pick up supplies and hardware; and operating a safety boat. Daskal claims that many of these tasks are not “construction activity,” other tasks, such as delivering supplies, are performed “off-site” and therefore not covered under *Ball, Ball and Brosamer*, 24 F.3d 1447, 1453 (D.C. Cir. 1994), and that Daskal had no notice of coverage of safety boat operators because the relevant page was missing from the wage determination provided to it by ConnDoT. Further, Daskal’s maintenance and supply shop was located in New London, Connecticut, not adjacent to the bridge project. (Morris at 9637-38). Daskal asserts much of the work time of its employees was spent in that shop and in running errands. Opening Brief of Campbell and Daskal, at 38-39.

¹⁶ We express no opinion as to whether A. & S. may have a cause of action against the State of Connecticut for indemnity for the back wages due as a result of payment of laborer’s rates for shower time.

In contrast, the Administrator argues that the Daskal workers were laborers or mechanics employed directly on the site of the work and so subject to the DBA. Opening Brief of the Administrator, at 47-50.

Our analysis begins with the DBA, the regulation, and pertinent case law. The DBA, 40 U.S.C.A. § 3141 (West Supp. 2003), provides that mechanics and laborers “employed directly on the site of the work” shall be paid local prevailing wage rates as determined by the Secretary of Labor. The regulations applicable at the time stated that:

(1) The site of the work is limited to the physical place or places where the construction called for in the contract will remain when work on it has been completed and . . . other adjacent or nearby property used by contractor or subcontractor in such construction which can reasonably be said to be included in the site.

(2) Except as provided in paragraph (1)(3) of this section, fabrication plants, mobile factories, batch plants, borrow pits, job headquarters, tool yards, etc. are part of the site of the work provided they are dedicated exclusively, or nearly so, to performance of the contract or project, and are so located in proximity to the actual construction location that it would be reasonable to include them.

29 C.F.R. § 5.2(l) (1995).¹⁷

In the leading case on interpretation of the statutory phrase “site of the work,” *Ball, Ball & Brosamer, Inc. v. Reich*, 24 F.3d 1447, 1452 (D.C. Cir. 1994), the D.C. Circuit held that the term did not apply to workers in borrow pits and batch plants located two miles from the construction site. The ARB has interpreted *Ball, Ball & Brosamer, Inc.* to permit coverage of workers working at “temporary batch plants on land integrated into the work area adjacent to the pumping plants [for an aqueduct.]” *Bechtel Constructors Corp.*, ARB No. 95-045A, ALJ No. 91-DBA-37 (ARB July 15, 1996).

We now turn to the evidence. Peckham’s report of investigation states “[t]he interviews [of Daskal employees whose names, with one exception, had been redacted] . . . establish that the work was on-site, with negligible off-site errands” (RX 11a). The interviews included the following statements:

- “He [the interviewee] had been working under the . . . bridge doing general labor. All of his work was on-site. They did go back and forth from the warehouse, but the warehouse was right under the bridge. He

¹⁷ The definition of “site of the work” was subsequently amended, but Daskal employees would be covered under the amended definition as well. See 29 C.F.R. § 5.2(l) (2004).

used a forklift to move [illegible] of paint [,] barrels of waste around the site. He mixed paint [, and] worked along with the painters when they were on the ground. They handled anything coming off the bridge. They took the bags of hazardous waste to the hazardous waste storage place” (RX 12).

- “Most of his time was spent cleaning up under the bridge, making sure the area below the bridge was clear. [He] brought materials on the site. They brought paint brushes, [and] parts for equipment. As barrels got full of waste, they stored them. . . . All this work was on[-]site.” (RX 13).
- “[M]ain duties were removing barrels of lead-contaminated stuff up to the containment area, working around the ground equipment, removing and placing hoses, [and] doing general clean up around the work area. The work was all on[-]site, under the bridge. . . . A large part of his work involved the contaminated waste. He took over where the apprentices left off. They took what was coming off the machines and what they swept up, put it in plastic bags, put the bags in barrels Once a week, they made a run off-site with the empty paint cans. . . . The off-site run was about an hour a week. . . . It was part of their job to clean the lunch area, but if the company was saying that was one of their main jobs, that’s wrong.” (RX 14).
- “His work was general laborer. Mostly he was doing general clean up on the ground, handling materials that came off the bridge, cleaning up around the machinery. It was on-site work, working under the bridge. He handled bags of hazardous waste, brought them to the drop-off point. He brought buckets of paint to the paint trucks . . . sometimes helped mix it Over 90% of his hours were on-site Once the bags [of grit] were in the barrels, it was Daskal people who capped the barrels, put them on pallets, [and] used the forklift to get them to the contaminated area. Daskal people also dealt with other contaminated, spent materials. They bagged things like the filters, brought them to the contaminated ‘containment area.’ They wore respirators when handling any of this stuff.” (RX 15, Statement of Anthony Green).

Green’s testimony at the hearing confirmed his statement given to Peckham. (See Green at 499-505). It is clear that most of the Daskal employees’ work was performed on the site of the bridge painting jobs, that is, directly under the bridges. The question remains whether the nature of the work was related to bridge painting, i.e., clean up of grit and debris.

There appears to be a direct conflict between the testimony of these employees and that of Peter Morris, General Superintendent and Vice President of Campbell

Painting, who insisted that Daskal employees never performed any tasks related to contaminated material. (Morris at 9747). We credit the employees' testimony over that of Morris for the following reasons:

First, it is difficult to believe that all these employees would misstate their duties and that these misstatements would parallel each other. Second, Morris testified that he knew the Daskal employees could not have performed tasks related to contaminated material because there were 12 to 14 KTA inspectors on-site who monitored all activity to insure compliance with environmental rules. (Morris at 9747). But on cross-examination, Morris conceded that Daskal employees probably wore respirators and protective coveralls. (Morris at 9750). Counsel for the Administrator asked, "If you had Daskal people wearing masks, and coveralls, and the same helmets as your Campbell people, how would the KTA inspector know whether it was a Daskal person or a Campbell person?" Morris answered "It didn't matter to me what a KTA inspector knew other than whether I got paid or not, it's what I knew that was really important to me." (Morris at 9750-51). This appears to be evasive and raises the question how Morris could know what occurred every day on-site.

Third, when confronted with Green's testimony that it was wrong to say a major part of the job of the Daskal employees was to clean up the lunch area, Morris testified that it took several hours a day because there were several shifts starting at different times and each had a coffee break and lunch period. (Morris at 9758-59). Nevertheless, it is difficult to believe that these duties took several hours a day for all Daskal employees. Accordingly, we reject Daskal's argument that its employees were not "laborers or mechanics" within the meaning of DBA.

Finally, with regard to the operators of safety boats that patrolled under the bridges, we agree with the Administrator and the ALJ that Daskal was required to pay them at least the federal prevailing wage rate for "power safety boat operators." (CX 292.) *See* R. D. & O. at 29-30. That a page containing this wage determination was missing from the contract documents does not excuse that obligation. *Id.*

We thus concur in the ALJ's ruling that Daskal's pay practices violated the DBA, R. D. & O. at 27-31, and adopt his conclusions with regard to back wages against Daskal for the reasons stated therein, *id.* at 54-56, Revised Appendix A.

VI. Shipsview and Christos Deligiannidis, and Jewell Painting and Cameron Jewell engaged in aggravated or willful violations of DBRA and should be debarred from obtaining contracts subject to the DBRA

A. The legal standard for debarment

In addition to the provisions requiring payment of prevailing wages, the further sanction of debarment for violation of the DBRA is provided for in the regulations, i.e., placement of certain violators' names on a list of persons and firms ineligible to receive federal contracts and subcontracts for a period not to exceed three years. Debarment for

violation of the DBRA is governed by 29 C.F.R. § 5.12 (2004), which provides in Section 5.12(a)(1):

Whenever any contractor or subcontractor is found by the Secretary of Labor to be in aggravated or willful violation of the labor standards provisions of any of the applicable statutes ... other than the Davis-Bacon Act, such contractor or subcontractor or any firm, corporation, partnership, or association in which such contractor or subcontractor has a substantial interest shall be ineligible for a period not to exceed 3 years (from the date of publication by the Comptroller General of the name or names of said contractor or subcontractor on the ineligible list...) to receive any contracts or subcontracts subject to [the Davis-Bacon Act or Related Acts].

29 C.F.R. § 5.12(a)(1).

As noted in *Gaines Elec. Serv. Co., Inc.*, WAB No. 87-48, slip op. at 4 (Feb. 12, 1991), the Supreme Court has observed that “in common usage the word ‘willful’ is considered synonymous with such words as ‘voluntary,’ ‘deliberate,’ and ‘intentional.’” See *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988). The term “willful,” the Court added, “is widely used in the law, and although it has not by any means been given a perfectly consistent interpretation, it is generally understood to refer to conduct that is not merely negligent.” *Id.* Furthermore, in *A. Vento Constr.*, WAB No. 87-51, slip op. at 7 (Oct. 17, 1990), the WAB noted that the “aggravated or willful” standard “has not been expanded to encompass merely inadvertent or negligent behavior. Instead, the actions typically found to be ‘aggravated or willful’ seem to meet the literal definition of those terms -- intentional, deliberate, knowing violations of the labor standards provisions of the Related Acts.” (footnotes omitted).

Under established law, a “willful” violation “encompass[es] intentional disregard, or plain indifference to the statutory requirements. . . . Although mere inadvertent or negligent conduct would not warrant debarment, conduct which evidences an intent to evade or a purposeful lack of attention to, [sic] a statutory responsibility does. Blissful ignorance is no defense to debarment.” *LTG Constr. Co.*, WAB No. 93-15, slip op. at 7 (Dec. 30, 1994) (citations omitted); see also *Cody-Zeigler, Inc.*, slip op. at 31; *Fontaine Bros., Inc.*, ARB No. 96-162, ALJ No. 94-DBA-48, slip op. at 3 (ARB Sept. 16, 1997).

Underpayment of prevailing wages coupled with the submission of falsified certified payrolls that masks the underpayments constitutes willful violation of the DBRA and warrants debarment. *Hugo Reforestation*, ARB No. 99-003, ALJ No. 97-SCA 20, slip op. at 3 (ARB Apr. 30, 2001); *Gaines Elec. Serv. Co.*, slip op. at 4; *A. Vento Constr.*, slip op. at 7, n.4; *Sundex, Ltd., and Joseph J. Bonavire*, ARB No. 98-130, ALJ No. 94-DBA-58 (ARB Dec. 30, 1999).

The Board has consistently and lawfully debarred responsible individual corporate officers in DBRA cases. *See Facchiano Constr. Corp. v. United States Dep't of Labor*, 987 F.2d 106, 213-14 (3d Cir. 1993) (affirming authority of Board to debar responsible officers); *Janik Paving & Constr., Inc. v. Brock*, 828 F.2d 84, 86 (2d Cir. 1987) (same). *See also Fontaine Bros., Inc.*, slip op. at 3 (president was actively involved in corporate matters and ran the company with his son).

B. Shipsview and Christos Deligiannidis subject to debarment

We apply the debarment rules to Shipsview and Christos Deligiannidis. There is ample record support for the ALJ's findings, see R. D. & O., slip op. at 71-78, and we adopt and summarize them here. The DBRA required Shipsview, under penalty of perjury, to submit true and accurate, certified payrolls. Deligiannidis testified that they were accurate. (Deligiannidis Depo., CX 212, at 132). However, numerous Shipsview employees testified that Shipsview regularly paid employees for fewer hours than they actually worked and/or paid employees straight time for overtime hours (*e.g.* Floyd Andrews at 984; Richard Flynn at 1424-26; Edward Alan DeChambeau at 6652, 6686; Ceferino Bayna at 6722-23, 6744, 6759; Tuomala at 10499), and that testimony was supported by individual employee records that showed more time than the certified payroll records. (*See, e.g.*, DeChambeau, CX 229, 271; Andrews, CX 119, 229).

Throughout the project, there were significant discrepancies between the Daily Inspector Reports and the certified payrolls submitted to the ConnDot. The Daily Inspector Reports showed more employee hours and listed employees as having worked who were not listed on the certified payrolls. The ALJ concluded that this evidenced willful and aggravated violations of the DBRA, R. D. & O. at 71-77, and we agree. The ALJ correctly rejected the argument of Shipsview and Deligiannidis that it was the victim of a union conspiracy. "Debarment cases under the DBRA frequently involve credibility disputes." *Id.* at 76. However, here, other than Deligiannidis' testimony, all the employee testimony, which the Daily Inspector Reports substantiated, demonstrated that "it was Shipsview's regular practice to 'short' employees on their hours." *Id.*

Shipsview and Deligiannidis also failed to produce all the employee time cards for the project upon request by the Wage and Hour investigator and Deligiannidis offered the explanation that the records had been "stolen." (Deligiannidis Depo., CX 212, at 138-39). The ALJ found that testimony conflicted directly with employee testimony, including the bookkeeper, who had no knowledge of the time cards being stolen. R. D. & O. at 74.

There were also discrepancies between the certified payrolls given to the Wage and Hour investigator and those submitted to ConnDot. The ALJ found these redactions of employee hours to have been deliberate deletions consistent with continued misconduct by Shipsview and Deligiannidis. *Id.* We concur. "Shipsview's union conspiracy theory also totally ignores the fact that Shipsview produced two separate sets of certified payrolls to [the Wage and Hour Division]. When the two sets of records are

compared, page for page, it is clear that the original set of payrolls had been altered by deletion prior to being given to the government's investigator." *Id.* at 77.

In short, the testimony and exhibits support the ALJ's findings and conclusions that Shipsvew and Deligiannidis "engaged in pervasive record falsification to conceal under payments to employees" and "deliberately deprived employees of wages to which they were entitled, falsified certified payroll records and hindered a federal investigation." *Id.* at 75, 78. We therefore agree with the ALJ that the Administrator has carried her burden of proving that Shipsvew and Deligiannidis' violations of DBRA were aggravated and willful and subject them to debarment.

C. Jewell Painting and Cameron Jewell subject to debarment

We turn to the facts justifying debarment of Jewell Painting and Cameron Jewell. Jewell violated the DBRA when it failed to pay its employees the prevailing wage for painters performing painters' tasks on the Arrigoni Bridge project. R. D. & O. at 41, 83. The underpayment of prevailing wages together with the submission of falsified certified payrolls constitutes willful violation of the DBRA and warrants debarment.

Cameron Jewell admitted he had submitted certified payrolls that were not true and accurate because they consistently showed that employees worked eight hours less than they actually did. (Jewell at 10092, 94-95). His practice was to pay employees for those hours through the use of "expense" checks, and the pay was at straight time rates although many of those hours were overtime. (Collette at 1770; CX 289, at 31, 36-37).¹⁸ Not only did this practice deprive employees of pay to which they were entitled under DBRA, it also reduced the amount of workers' compensation, social security and unemployment compensation taxes paid by Jewell. R. D. & O. at 79.

We reject Jewell's argument that its practice of paying employees, on a "voluntary" basis, \$175 for eight hours of overtime, does not evidence alteration of records or an intent to deceive the Department of Labor. Jewell claims these "agreements" with its workers "resulted in hours not being reported when the certified payrolls were prepared. . . .", not that Jewell altered its certified payrolls. Jewell Opening Brief at 28. This argument is without merit. Jewell consciously excluded overtime hours from its certified payrolls, hours for which it did not pay anything close to time and one half the regular rate. Jewell would have the Board accept the proposition that it is not in aggravated and willful violation of the acts because it never altered its payroll records after they were first prepared because those records falsely reported that the workers had not worked this overtime. Simply to state this proposition is to demonstrate its speciousness, as well as the aggravated and willful nature of Jewell's violations. The regulations do not simply forbid "alteration" of records already falsely created, they

¹⁸ Two exhibits labeled "CX 289" are in the record; this discussion refers to the one dated by hand "7/18/00," the deposition of Lowell Passons. (The other CX 289, dated by hand 6/9/00, is the deposition of Steven Bogan.)

require accurate record-keeping of “hourly rates of wages paid . . . [and] daily and weekly number of hours worked. . . .” 29 C.F.R. § 5.5(a)(3).

Furthermore, Jewell does not mention another crucial element in its scheme to avoid payment of required overtime and to falsify its records: the checks for these flat dollar amounts were listed as reimbursements for expenses, not overtime pay. Lowell Passons, a painter and painting foreman on the Arrigoni project, testified by deposition that, in weeks when there was a lot of overtime worked, Jewell asked the workers to accept “reimbursement checks for overtime hours to work just straight time so that they didn’t have to pay such a massive amount of taxes and workmen’s compensation.” (Passons Depo., CX 289 at 37.)

Passons’ testimony that Cameron Jewell asked Passons on several occasions to drop his Department of Labor complaint conclusively shows Jewell’s bad faith. Passons testified, “[Jewell] told me that [the complaint] could cause some serious trouble for him and he asked me to recant my complaint. . . . He asked me just not to pursue the complaint.” (*Id.* at 95-96). Passons refused. On another occasion, Jewell asked Passons to sign a statement that these payments were payments for a truck. (*Id.* at 99; Ex. 6; CX 299). Incredibly, the statement Jewell asked Passons to sign said “I [Passons] accepted and agreed to be paid a lump sum check in the amount of \$175 credited as a pickup truck expense when I worked in excess of 40 hours per week.” Passons refused to sign the statement. (Passons Depo., CX 289 at 100). Consequently, Jewell’s own hand inescapably confirmed his willful and aggravated attempt to avoid the overtime requirements of the acts as well as to falsify his records.

Accordingly we affirm the recommendation of the ALJ that Jewell Painting and Cameron Jewell should be debarred. R. D. & O. at 71.

CONCLUSION

To recapitulate, we have made the following rulings:

The record supports the ALJ’s findings of fact and conclusions of law notwithstanding his adoption of the Administrator’s post-hearing brief.

The DBRA required the contractors to pay collectively bargained painters’ rates for the bridge painting work at issue and the Respondent contractors violated the DBRA when they misclassified and underpaid employees performing work on the subject bridge painting projects. We adopt the ALJ’s conclusion that DOL properly computed back wages against the Respondent contractors.

We have rejected the Respondent contractors’ arguments, namely that the scope of work clauses in the collective bargaining agreements were ambiguous and did not inform contractors that painters claimed the work; that the LAPS was inadequate and relieved the contractors of the responsibility of complying with the DBRA; that “mixed crews” of painters, carpenters and laborers worked on bridge painting projects and local

area practice assigned grit collection to laborers; that the contractors were entitled to make wage classification decisions based on a “tools of the trade analysis”; that a change in containment standards represented new technology not governed by the previous wage classifications; and that the DOL should be estopped from charging misclassification of workers and seeking back pay because the ConnDoT acquiesced in and/or directed the contractors to pay carpenter and laborer rates on bridge painting work.

For purposes of DBA coverage, Daskal workers that were performing clean up duties on the ground below the bridges were “laborers or mechanics” employed “directly on the site of the work.” We have concurred in the ALJ’s ruling that Daskal’s pay practices violated the DBA, and have adopted his conclusions with regard to back wages against Daskal.

Shipsview and Christos Deligiannidis, and Jewell Painting and Cameron Jewell engaged in aggravated or willful violations of the DBRA and they should be debarred from obtaining contracts subject to the DBRA for a period not to exceed three years.

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge